No.

IN THE SUPREME COURT OF THE UNITED STATES

E.W. JILES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

On review of plain *Booker* error, should the court of appeals (i) presume that the error prejudiced the defendant, as in the Third, Fourth, and Sixth Circuits, (ii) remand to the district court for a determination of prejudice, as in the Second, Seventh, Ninth, and District of Columbia Circuits, or (iii) require the defendant to establish prejudice based on the sentencing record, as in the First, Fifth, Eighth, Tenth, and Eleventh Circuits?

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PETITION FOR A WRIT OF CERTIORARI

E.W. Jiles petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals affirming Jiles' sentence is unreported. App. 1a-8a. The district court's judgment and oral ruling on sentencing issues (App. 9a-21a) are unreported.

JURISDICTION

The court of appeals issued its opinion affirming Jiles' sentence on September 27, 2005. App. 1a. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1). The court of appeals had jurisdiction under 28 U.S.C. § 1291.

CONSTITUTIONAL AND GUIDELINES PROVISIONS INVOLVED

U.S. Const. Amend. V provides in relevant part:

> No person shall be . . . deprived of life, liberty, or property without due process of law.

U.S. Const. Amend. VI provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and

public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

U.S.S.G. § 3A1.1(b) provides:

(1) If the defendant knew or should have known that a victim of the offense was a vulnerable victim, increase by **2** levels.

(2) If (A) subdivision (1) applies; and (B) the offense involved a large number of vulnerable victims, increase the offense level determined under subdivision (1) by **2** additional levels.

U.S.S.G. § 3B1.1(a) provides:

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by **4** levels.

INTRODUCTION

Since this Court decided *United States v. Booker*, 543 U.S. 220 (2005), the courts of appeals have split sharply over application of the plain error standard to cases like this one where, without objection, district courts sentenced defendants under the mandatory federal sentencing

guidelines regime based on facts that the court found by a preponderance of the evidence. This case permits the Court to bring uniformity to this important question, which affects numerous pre-*Booker* sentencings that are on direct appeal.

Uniform application of plain error review is essential to eliminate the unfairly disparate treatment that defendants in different circuits now receive. If Jiles' appeal had been heard in the Third, Fourth, or Sixth Circuits, he would have obtained a resentencing. Had his case been heard in the Second, Seventh, Ninth, or District of Columbia Circuits, he would have obtained a remand for the district court to determine whether the violation of his constitutional rights at the initial sentencing prejudiced him. But because Jiles' appeal was heard in the Tenth Circuit--which, along with the First, Fifth, Eighth, and Eleventh Circuits, takes the most stringent view of *Booker* plain error review--his sentence was affirmed, despite the court of appeals' conclusion that the district court committed plain constitutional error. The Court should grant certiorari to end the uneven treatment that defendants who failed to object to *Booker* error now receive in the courts of appeals.

STATEMENT OF THE CASE

On February 20, 2002, a grand jury in the Western District of Oklahoma charged Jiles with bribery concerning a program receiving federal funds (18 U.S.C. § 666), money laundering conspiracy (18 U.S.C. § 1956(h)), and other offenses. The indictment alleged that Jiles, who operated several nursing homes in Oklahoma, bribed Brent VanMeter, an official at the Oklahoma State Department of Health ("OSDH") who regulated nursing homes, and conspired with VanMeter to launder the bribe money. According to the indictment, Jiles bribed VanMeter to transfer residents from

nursing homes that had been closed to homes that Jiles operated and to appoint MMGI, a management company that Jiles controlled, as temporary manager of troubled nursing homes.

On March 3, 2003, Jiles pleaded guilty to a single count of conspiracy to commit money laundering. In pleading guilty, Jiles admitted that he "bribed Brent VanMeter and helped him launder bribe money through the KIS account to effect appointment of temporary managers, all during the period of indictment." Aplt. App. 60. Neither the petition to enter plea of guilty nor the plea agreement contains an agreed or binding guidelines calculation under Fed. R. Crim. P. 11(c)(1)(B) or (C).

The final presentence report recommended a four-level upward adjustment under U.S.S.G. § 3A1.1(b)(1) and (2) for a large number of vulnerable victims and a four-level upward adjustment under § 3B1.1(a) for Jiles' role in the offense. Jiles objected to these proposed adjustments. In addition, Jiles moved for a downward departure based on extraordinary family circumstances (particularly the crucial role he plays in the life of his granddaughters, one of whom has spinal bifida), the disparity between his guidelines sentence and VanMeter's sentence, his age (68 at the time of sentencing), the aberrant nature of his conduct, his community service and other good works (including extensive work on behalf of persons suffering from AIDS), and a combination of these factors. In support of his motion for downward departure, Jiles submitted a number of letters that praised his kindness and integrity, detailed his contributions to the community over many years, and described his devotion to his family.

The district court conducted a three-day sentencing hearing on the vulnerable victim and role in the offense adjustments. On the victim adjustment, the government presented evidence that several residents moved from closed nursing homes to homes allegedly associated with Jiles--Raymond Powell, Chuck Cherry, Jerry McGaugh, and Larry Nephew--suffered "transfer shock" from the move. Government witnesses conceded, however, that when a home is closed the residents must move and transfer trauma may occur regardless of where the residents go. The government also conceded that the state had properly closed the homes from which the residents were moved. In one instance, for example, the conditions at the closed home were "horrible." A facility allegedly associated with Jiles accepted the residents of that home, who were starving and filthy, and fed and cared for them without any assurance of payment. Jiles presented evidence that the residents of the closed homes were treated appropriately in connection with the transfers. Indeed, at least one of the residents who allegedly suffered transfer shock chose to remain at the new facility for years after the move.

The government criticized Jiles' operation of nursing homes, and it offered hearsay evidence that the lockdown unit at Rosewood Manor--one of the homes for which MMGI served as temporary manager--had substandard conditions during one survey. But Jiles established that the problems at the Rosewood unit existed several months after MMGI had taken over as temporary manager, when MMGI was correcting deficiencies left by prior management, and that all the deficiencies were cleared soon after the observation of the lockdown unit. Jiles presented evidence about the high quality of the nursing homes he operated. And he offered testimony from relatives of residents at his homes, who attested to the outstanding facilities and service.

On the role in the offense adjustment, the government contended that Jiles' criminal conduct--including both the bribes to obtain temporary managerships, which Jiles admitted as part of the plea, and the alleged bribes to obtain the transfer of residents from closed homes, which Jiles did not admit--included more than five "participants," meaning persons who are "criminally responsible for the commission of the offense," U.S.S.G. § 3B1.1, app. note 1, and was "otherwise extensive" for purposes of § 3B1.1. Jiles disputed the role adjustment on two principal grounds: that VanMeter, and not Jiles, controlled the OSDH employees at issue, and that the criminal conduct neither involved five or more "participants" nor was "otherwise extensive."

At the hearing, the government offered testimony that Jiles paid bribes to VanMeter and a second official--Judy Cochran--and enjoyed influence at the OSDH as a result. The government also presented evidence that Jiles helped VanMeter launder bribe money that Jiles had given VanMeter in return for temporary manager appointments. The government thus established two "participants" in the money laundering conspiracy--Jiles and VanMeter--and three "participants" in the bribery--Jiles, VanMeter, and Cochran. But the evidence was equivocal on whether the other persons alleged to be "participants"--Karen Verner of OSDH and Christopher "Kitt" Wakeley of MMGI--were "criminally responsible," on whether the criminal activity was "otherwise extensive," and on whether Jiles or VanMeter controlled the OSDH employees involved.

At sentencing on September 25, 2003, the district court applied the vulnerable victim adjustment under U.S.S.G. § 3A1.1(b)(1). The court acknowledged that the adjustment "is certainly not as clear cut as I had first thought." App. 10a. It applied the adjustment based on

"relevant conduct," including "not just the money laundering to which Mr. Jiles has pled guilty but also the entire criminal scheme about which we have heard so much." *Id.* The court recognized that the closings of homes "occurred through no fault of Mr. Jiles" and "would have occurred whether he was bribing Mr. VanMeter or not." *Id.* It found, however, that "the way [the closings] were handled was far different than they would have been handled had this bribery not been going on," because "[p]rotocol was not followed," "[p]eople were transferred at great distances away from the closed facility," and "[f]amilies were affected." The court concluded that one resident "is lost to society forever, if not a long time, as a result of having been taken in a way that was not appropriate under the Department of Health's protocols." *Id.*

The court further found that there was a large number of vulnerable victims under § 3A1.1(b)(2). In making this finding, the court counted as victims Powell, Cherry, McGaugh, and Nephew, and "[t]he people who were in Rosewood, which was not cleaned up as a result of the collusion between Mr. VanMeter and Mr. Jiles, that some months later was found to be the worst situation that the examiner had ever seen." App. 11a. The court found it "hard not to look at the entire population of nursing homes in the State of Oklahoma as potential victims of Mr. Jiles and Mr. VanMeter's conduct had it been allowed to continue." App. 11a-12a.

Turning to the role in the offense adjustment under § 3B1.1, the court again looked to relevant conduct. The court found that Jiles' criminal conduct (including relevant conduct) involved Jiles, VanMeter, Cochran, Verner, Wakeley, and possibly others and was "otherwise extensive."

The court also found that Jiles was the "organizer" and "leader" of the criminal activity. App. 12a-13a.

The court rejected Jiles' downward departure motion. It found that Jiles' "family circumstances, while compelling, are simply not so different from those of any criminal defendant being sentenced that they take it out of the heartland." App. 15a-17a. It declared that the disparity between Jiles' and VanMeter's sentences "is not an appropriate ground for departure, and there are good reasons for that disparity, in any event." App. 16a. The court concluded that, although Jiles' advanced age might make it "unpleasant in prison," "[t]here is nothing about that that takes this out of the heartland." App. 16a. The court rejected an aberrant behavior departure. App. 16a-17a. And it concluded that "community service and other prior good works is simply not appropriate in this case. Your good works are to be admired and encouraged but they are not circumstances that take this out of the heartland of cases." App. 17a.

The district court established a base offense level of 20 under U.S.S.G. § 2S1.1, which it reduced two levels under § 3E1.1 for acceptance of responsibility. Applying the two-level adjustment under § 3A1.1(b)(1) for vulnerable victims, the additional two-level adjustment under § 3A1.1(b)(2) for a large number of vulnerable victims, and the four-level role in the offense adjustment under § 3B1.1(a), the court set Jiles' offense level at 26 and his criminal history category at I, producing a sentencing range of 63 to 78 months. The court imposed a sentence of 63 months, at the bottom of the range. App. 17a-18a. It declared:

> While I believe that the factors that you urged in support of a downward departure are not sufficient for a departure, I do believe that those circumstances merit a sentence at the bottom of the guideline range. Even a sentence at the bottom is certainly a significant sentence in this case, and particularly to someone who has no prior criminal history, and I think given the goals of sentencing, as set out in the statute, that the bottom of the range is sufficient in this case.

App. 18a.

Jiles appealed. On May 14, 2004, the court of appeals dismissed the appeal under an appeal waiver provision in Jiles' plea agreement. Jiles sought a writ of certiorari, arguing that the district court committed plain error in light of this Court's intervening decision in *Blakely v. Washington*, 542 U.S. 296 (2004). On January 24, 2005, this Court granted the writ, vacated the court of appeals' decision, and remanded in light of *Booker*. *Jiles v. United States*, 125 S. Ct. 1051 (2005) (mem.). Following the remand, the court of appeals determined that the appeal waiver provision does not extend to the *Booker* issue. App. 3a.

On the merits, the court of appeals declined to vacate Jiles' sentence. The government conceded, and the court found, that the district court committed plain error by increasing Jiles' sentence on the basis of facts found by the court, rather than a jury, under the preponderance of the evidence standard. App. 4a. But the court concluded that Jiles did not satisfy the third prong of the plain error standard of review--that is, he did not show that the district court's error "affect[ed] substantial rights." App. 6a-8a. Relying on a prior decision, the court rejected Jiles' contentions that

"sentencing under the mandatory guidelines constituted structural error and that *Booker* error should be presumed prejudicial." App. 5a n.1. The court of appeals found no "reasonable probability" that, absent the district court's error, either a jury or the district court would have reached a different conclusion. App. 6a, 8a. The court did not reach the fourth plain error factor--whether the error "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." App. 8a.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ to resolve the clear three-way split in the circuits on the proper application of the plain error standard to *Booker* error. Although many *Booker* plain error cases have already been decided, a review of recent decisions shows that many more remain in the appellate pipeline. The appellants in these cases should receive uniform treatment; the outcome of their appeals should not depend on whether they happen to have been convicted (for example) in Oklahoma (in which case, like Jiles, they have little chance of success) or Kentucky (in which case they are virtually guaranteed resentencing) or New York (in which case they will receive a remand to the district court for a prejudice inquiry).

I. THE COURT SHOULD GRANT THE WRIT TO RESOLVE THE THREE-WAY SPLIT IN THE CIRCUITS OVER PLAIN ERROR REVIEW OF *BOOKER* ERROR.

To obtain reversal under the plain error standard, an appellant must establish (1) that there is "error," (2) that the error is "plain," and (3) that the error "affects substantial rights." If all three conditions are met, an appellate court may exercise its discretion to notice a forfeited error, but

only if the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Johnson v. United States*, 520 U.S. 461, 467 (1997) (quotation omitted).

Since this Court decided *Booker* less than a year ago, the courts of appeals have split three ways over the proper application of the third prong of plain error review to constitutional *Booker* errors--that is, cases where the district court (rather than a jury) found facts by a preponderance of the evidence that increased the defendant's sentence. The courts have disagreed over the proper means of determining whether such errors "affect[] substantial rights."

The Third, Fourth, and Sixth Circuits presume--either explicitly or implicitly--that constitutional *Booker* errors affect substantial rights and vacate the defendant's sentence in virtually all plain error cases.[1] The Second, Seventh, Ninth, and District of Columbia Circuits, by contrast, remand most *Booker* plain error cases to permit the district court to determine in the first instance whether the court would impose a different sentence under the *Booker* regime.[2] And the First, Fifth, Eighth, Tenth, and Eleventh Circuits apply a stringent standard under which the defendant must establish on appeal, through evidence in the district court

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[1] *See, e.g., United States v. Davis*, 407 F.3d 162, 164-65 (3d Cir. 2005) (en banc); *United States v. Hughes*, 401 F.3d 540, 548-52 (4th Cir. 2005); *United States v. Hamm*, 400 F.3d 336, 339-40 (6th Cir. 2005); *United States v. Barnett*, 398 F.3d 516, 528-29 (6th Cir. 2005). Within each of the three general approaches described in the text, there are inter- and intra-circuit variations that we do not address.

[2] *See, e.g., United States v. Ameline*, 409 F.3d 1073, 1081-86 (9th Cir. 2005) (en banc); *United States v. Coles*, 403 F.3d 764, 771 (D.C. Cir. 2005) (per curiam); *United States v. Paladino*, 401 F.3d 471, 483-85 (7th Cir. 2005); *United States v. Crosby*, 397 F.3d 103, 114-18 (2d Cir. 2005).

record, a reasonable probability of a different outcome under the *Booker* standards.[3]

These disparate approaches produce radically different results. In the three circuits that adopt the "presumption" approach, appellants subject to constitutional *Booker* error generally obtain a resentencing, even if, for example, the district court initially sentenced the defendant in the middle of the guideline range and thus declined to exercise even its limited discretion in the defendant's favor. In the four circuits that adopt the "remand" approach, appellants subject to constitutional *Booker* error generally obtain a remand at which the district court determines expressly whether it would impose a different sentence under the *Booker* advisory guidelines regime. Thus, in seven circuits a defendant sentenced based on judge-found facts has a near-absolute right to appear again before the district court for a sentencing determination that comports with the Constitution.

In the five remaining circuits, however--including the Tenth, where Jiles' appeal was heard--defendants who have suffered constitutional *Booker* error have no such right. Under the Tenth Circuit's approach, a defendant must demonstrate, on a pre-*Booker* and often pre-*Blakely* sentencing record, a reasonable probability that a jury would have reached a different conclusion than the court on the aggravating facts, or that the court would impose a shorter

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[3] *See, e.g., United States v. Pirani*, 406 F.3d 543, 552-53 (8th Cir.) (en banc), *cert. denied*, 126 S. Ct. 266 (2005); *United States v. Dazey*, 403 F.3d 1147, 1175 (10th Cir. 2005); *United States v. Mares*, 402 F.3d 511, 521-22 (5th Cir.), *cert. denied*, 126 S. Ct. 43 (2005); *United States v. Antonakopoulos*, 399 F.3d 68, 77-82 (1st Cir. 2005); *United States v. Rodriguez*, 398 F.3d 1291, 1299-1301 (11th Cir.), *cert. denied*, 125 S. Ct. 2935 (2005).

sentence under the *Booker* regime. App. 4a-5a. This is a heavy burden that defendants can rarely meet. It is not enough to satisfy the burden that (as here) the improper judicial factfinding roughly doubled the defendant's sentence. It is not enough that (as here) the district court sentenced the defendant at the bottom of the applicable guideline range. App. 7a.[4] It is not enough that (as here) the defendant vigorously challenged the evidence supporting the enhanced sentence "through cross-examination, objection, and the introduction of witnesses." App. 6a. And it is not enough that the district court complained generally about the harshness of the guidelines.[5] Instead, a defendant's remedy for his unconstitutional sentence generally turns on whether the district court happened to state that, if unconstrained by the guidelines, it would have imposed a shorter sentence. App. 5a.[6]

The approach that the Tenth Circuit follows (together with the First, Fifth, Eighth, and Eleventh Circuits) thus rests the defendant's fate largely on the happenstance of the district court's sentencing dictum. This application of the third plain error prong places an unfair and usually insurmountable burden on the appellant. As the Sixth Circuit observed in adopting a presumption of prejudice:

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[4] *See, e.g., United States v. Guzman*, 419 F.3d 27, 33 (1st Cir. 2005); *United States v. Pirani*, 406 F.3d 543, 553 (8th Cir.) (en banc), *cert. denied*, 126 S. Ct. 266 (2005).

[5] *See, e.g., United States v. Guzman*, 419 F.3d 27, 33 (1st Cir. 2005); *United States v. Pirani*, 406 F.3d 543, 553 n.6 (8th Cir.) (en banc), *cert. denied*, 126 S. Ct. 266 (2005).

[6] *See, e.g., United States v. Jimenez-Gutierrez*, 425 F.3d 1123, 1126 (8th Cir. 2005); *United States v. Rodriguez-Ceballos*, 407 F.3d 937, 941 (8th Cir. 2005); *United States v. Clifton*, 406 F.3d 1173, 1181-83 (10th Cir. 2005); *United States v. Antonakopoulos*, 399 F.3d 68, 81 (1st Cir. 2005).

> The extraordinary difficulty facing defendants . . . in showing that the use of mandatory, rather than advisory, Guidelines affected the outcome of their sentencing proceedings is exacerbated by the fact that to make such a showing, the defendants would presumably have to demonstrate that the district court somehow intimated that it felt constrained by the Guidelines or that it would have preferred to sentence the defendant to a lower sentence. This, in our view, is too exacting a burden, given the fact that this Court, along with others, had repeatedly instructed sentencing courts pre-*Booker* to impose sentences within the applicable mandatory Guidelines range, with limited exceptions, and had consistently upheld the constitutionality of the Guidelines and their mandatory nature, even after the Supreme Court's decision in *Blakely*.

United States v. Barnett, 398 F.3d 516, 528 (6th Cir. 2005); *see, e.g., United States v. Ameline*, 409 F.3d 1073, 1078-79 (9th Cir. 2005) (en banc) ("We surmise that the record in very few cases will provide a reliable answer to the question of whether the judge would have imposed a different sentence had the Guidelines been viewed as advisory. . . . Pre-*Booker*, there simply would have been no need or practical reason for the judge to make such a record, since the judge could not have expected then that it would make a legal difference."). By granting the writ in this case, the Court can correct the unduly harsh plain error standard adopted by the First, Fifth, Eighth, Tenth, and Eleventh Circuits.

II. A DECISION IN THIS CASE WILL PROVIDE GUIDANCE IN THE MANY PLAIN ERROR *BOOKER* CASES STILL IN THE APPELLATE PROCESS.

In the eleven months since this Court decided *Booker*, the courts of appeals have decided hundreds of plain error cases involving constitutional *Booker* error. Through these decisions, the courts have solidified the three-way circuit split outlined above. But the courts of appeals continue to decide dozens of plain error *Booker* cases. In the first three weeks of December 2005 alone, for example, the federal appellate courts issued published or unpublished opinions in more than 55 such cases.

These decisions continue the pattern outlined above. The overwhelming majority of appellants presenting plain error *Booker* issues in the Second, Third, Fourth, Sixth, Seventh, Ninth, and District of Columbia Circuits obtain either a resentencing or a remand to the district court for a determination of prejudice.[7] By contrast, the overwhelming majority of such appellants in the First, Fifth, Eighth, Tenth, and Eleventh Circuits have their sentences affirmed, despite plain constitutional error, because they cannot demonstrate on a pre-*Booker* sentencing record that the district court would have imposed a shorter sentence under the post-*Booker* regime.[8] As these recent decisions demonstrate, the

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[7] *See, e.g., United States v. Gomez*, 2005 U.S. App. LEXIS 27162, at *17-*24 (D.C. Cir. Dec. 13, 2005); *United States v. Sahanaja*, 2005 U.S. App. LEXIS 26808, at *18-*24 (9th Cir. Dec. 8, 2005).

[8] *See, e.g., United States v. Jones*, 2005 U.S. App. LEXIS 28022, at *25-*29 (1st Cir. Dec. 19, 2005); *United States v. Lopez*, 2005 U.S. App. LEXIS 27151, at *8-*12 (8th Cir. Dec. 13, 2005). *But see United States*

need for this Court to end the disparate treatment of unconstitutionally sentenced defendants who happen to have been convicted in different parts of the country remains as great as ever.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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(continued...)

v. Starnes, 2005 U.S. App. LEXIS 26890, at *21-*24 (5th Cir. Dec. 7, 2005) (unpublished) (vacating sentence).

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. E.W. "DUB" JILES, Defendant-Appellant.	No. 03-6277 (D.C. No. 02-CR-29-C) (W.D. Okla.)

ORDER AND JUDGMENT*

(Filed September 27, 2005)

Before **KELLY, O'BRIEN**, and **TYMKOVICH**, Circuit Judges.**

Defendant-Appellant E.W. "Dub" Jiles appeals his sentence imposed following a plea of guilty to one count of conspiracy to commit money laundering in violation of 18

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

** After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1(G). The cause is therefore ordered submitted without oral argument.

U.S.C. § 1956(h). Mr. Jiles asserts that the district court committed plain error by increasing his sentence under a mandatory sentencing guidelines system on the basis of judicially determined facts in contravention of *United States v. Booker*, 125 S. Ct. 738 (2005). Our jurisdiction arises under 28 U.S.C. § 1291, and we affirm.

Background

The parties are familiar with the facts, and we need not repeat them in detail here. On February 20, 2002, Mr. Jiles was indicted on numerous counts involving bribery, money laundering, and other offenses. The indictment alleged that Mr. Jiles, who operated several nursing homes in Oklahoma, bribed Brent VanMeter, an official at the Oklahoma State Department of Health. The purpose was to transfer residents from nursing homes that had been closed to homes that Mr. Jiles operated and to appoint a management company controlled by Mr. Jiles as temporary manager of troubled nursing homes. Under the terms of a plea agreement, Mr. Jiles pleaded guilty to a single count of conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h).

The final presentence report established Mr. Jiles' base offense level under the Sentencing Guidelines at 20 and recommended upward adjustments based on the amount of funds laundered during the conspiracy (U.S.S.G. § 2S1.1), the vulnerability (U.S.S.G. § 3A1.1(b)(1)) and number (U.S.S.G. § 3A1.1(b)(2)) of victims, and Mr. Jiles' role in the scheme (U.S.S.G. § 3B1.1(a)). The presentence report also indicated that an adjustment for acceptance of responsibility (U.S.S.G. § 3E1.1) was not warranted. The

resulting offense level was 31, with a sentencing range of 108-135 months imprisonment.

Prior to the sentencing hearing, the district court granted two defense objections that resulted in a 5 level reduction in the total offense level to 26, with a sentencing range of 63-78 months. Following a three-day sentencing hearing, the district court sustained the upward adjustments relating to the vulnerability and number of victims as well as the adjustment for Mr. Jiles' role in the offense. The district court sentenced Mr. Jiles to 63 months imprisonment, the bottom of the sentencing range.

Mr. Jiles subsequently appealed his sentence. The government moved for dismissal on the basis of a waiver of appellate rights found in the plea agreement. On May 14, 2005, this court granted the government's motion. Mr. Jiles then sought certiorari review before the United States Supreme Court, arguing that his guidelines sentence was unconstitutional under the rule propounded in *Blakely v. Washington*, 542 U.S. 296 (2004). The Supreme Court granted certiorari and remanded the case for reconsideration in light of its decision in *United States v. Booker*, 125 S. Ct. 738 (2005). We thereafter denied a motion by the government to dismiss the case and ordered briefing on the *Booker* issue to proceed. We now address Mr. Jiles' arguments on appeal.

Discussion

The sole issue on appeal is whether the district court committed plain error in enhancing Mr. Jiles' sentence on the basis of judicially determined facts under a mandatory sentencing system. In *Booker*, the Supreme Court held that "[a]ny fact (other than a prior conviction) which is

necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." 125 S. Ct. at 756. Under the substantive rule propounded in *Booker*, a sentence enhanced under mandatory sentencing guidelines on the basis of judicially determined facts runs afoul of the Sixth Amendment's right to jury trial. *Id.*

Because Mr. Jiles did not raise the *Booker* issue before the district court, we review for plain error. *United States v. Gonzalez-Huerta*, 403 F.3d 727, 732 (10th Cir. 2005) (en banc). "'Plain error occurs when there is (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* (quoting *United States v. Burbage*, 365 F.3d 1174, 1180 (10th Cir. 2004)). The government concedes that the first two prongs of plain error review are satisfied in this case. Aplee. Br. at 31.

Our inquiry now turns to the third prong of plain error review. As we have repeatedly emphasized, the defendant bears the burden under plain error review to demonstrate that the alleged error in sentencing affects his substantial rights. *Gonzalez-Huerta*, 403 F.3d at 736; *United States v. Clifton*, 406 F.3d 1173, 1181 (10th Cir. 2005). There exist at least two ways to satisfy this burden.

> First, if the defendant shows a reasonable probability that a jury applying a reasonable doubt standard would not have found the same material facts that a judge found by a preponderance of the evidence, then the defendant successfully demonstrates that the error below affected his substantial rights. This inquiry requires the appellate court to review the evidence submitted at

> the sentencing hearing and the factual basis for any objection the defendant may have made to the facts on which the sentence was predicated. Second, a defendant may show that the district court's error affected his substantial rights by demonstrating a reasonable probability that, under the specific facts of his case as analyzed under the sentencing factors of 18 U.S.C. § 3553(a), the district court judge would reasonably impose a sentence outside the guidelines range. For example, if during sentencing the district court expressed its view that the defendant's conduct, based on the record, did not warrant the minimum Guidelines sentence, this might well be sufficient to conclude that the defendant had shown that the *Booker* error affected the defendant's substantial rights.

United States v. Dazey, 403 F.3d 1147, 1175 (10th Cir. 2005). In this case, Mr. Jiles asserts that there exists both a reasonable probability that a jury would not have found the same material facts under a reasonable doubt standard and that the district court judge would have imposed a sentence outside the guidelines range had he not been bound. We address each allegation in turn.[1]

Mr. Jiles first asserts that a jury might have reached different conclusions under a reasonable doubt standard as to the identity of victims of the offense, their number, and the number of participants in the offense. Beyond such conclusory assertions, the essence of his argument is

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[1] Mr. Jiles also argues that sentencing under the mandatory guidelines constituted structural error and that *Booker* error should be presumed prejudicial. Mr. Jiles acknowledges, however, that this court rejected these arguments in *Gonzalez-Huerta*, 403 F.3d at 734-36. We merely note that Mr. Jiles has preserved the issues.

that because he "'strenuously contested the factual basis for the sentencing enhancements,'" he has satisfied the third prong of plain error review. Aplt. Br. at 18 (quoting *Dazey*, 403 F.3d at 1177). This argument is unpersuasive.

Mr. Jiles argument rests on the incomplete premise that merely contesting the government's evidence through cross-examination, objection, and the introduction of witnesses somehow satisfies the requirement that the defendant demonstrate a "reasonable probability" that a jury would have reached a different conclusion under a reasonable doubt standard. A "reasonable probability" exists where the probability of a different result is "sufficient to undermine the confidence in the outcome of the proceeding." *United States v. Dominguez Benitez*, 124 S. Ct. 2333, 2340 (2004). Our determination necessarily invokes a qualitative and quantitative assessment of the evidence in the record. *See id.* In this case the evidence overwhelmingly supports the district court's determination.

After carefully reviewing the record, we conclude that a reasonable probability of a jury reaching a different conclusion with respect to the sentencing enhancements does not exist. Testimony by the government's witnesses and Mr. Jiles' own captured conversations presented overwhelming evidence supporting the enhancements. Though important, the testimony of Mr. Jiles' witnesses and defense counsel's cross examination were simply insufficient to cast serious doubt on the factual bases underpinning the sentence enhancements. At best, Mr. Jiles' witnesses presented an incomplete picture of the factual circumstances that was undermined by the government witnesses' testimony and the Defendant's own statements. Mr. Jiles makes much of the fact that a jury

might have chosen to credit the testimony of Tim Pickert, a long-time friend and employee of Mr. Jiles, whom the district court described as an "entirely incredible witness." III Aplt. App. at 730. However, Mr. Jiles has failed to even allege what difference such a credibility determination could have made given the limited nature of Mr. Pickert's testimony and the overwhelming evidence in contradiction. No reasonable probability of a different result exists, even with a more demanding standard of proof.

We next turn to Mr. Jiles' assertion that there exists a reasonable probability that the district judge would impose a sentence outside the guidelines range. We agree with the government that Mr. Jiles' assertion is undermined by the district court's careful consideration of the relevant facts in relation to the sentencing factors in 18 U.S.C. § 3553(a). Although Mr. Jiles was sentenced at the bottom of the Sentencing Guidelines range, the district court gave no indication that it viewed the minimum guidelines sentence as excessive. *See Gonzalez-Huerta*, 403 F.3d at 734; *Dazey*, 403 F.3d 1175; *United States v. Shelton*, 400 F.3d 1325, 1328, 1332-33 (11th Cir. 2005). Many of the arguments Mr. Jiles urges here were considered by the district court in denying the defendant's motion for downward departure. The district court made clear that the grounds proffered were insufficient to warrant a downward departure, but that the "circumstances merit[ed] a sentence at the bottom of the guideline range." III Aplt. App. at 738. Continuing, the district court noted that "given the goals of sentencing, as set out in the statute, . . . the bottom of the range is sufficient in this case." *Id.*

Post-*Booker*, district courts are still required to consult the Sentencing Guidelines in determining sentences, even though they are not bound to sentence within

the guideline range. *Gonzalez-Huerta*, 403 F.3d at 731. The district court's on-record consideration of the sentencing factors and its ultimate sentence determination lead us to conclude that Mr. Jiles has failed to demonstrate a reasonable probability that the district court would sentence outside the guideline range. Satisfying the third prong of plain error review requires more than reasserting arguments made to the district court or "cherry picking" the record for extra-contextual comments. We can glean nothing from the above-quoted comments that would lead us to conclude that the district court might have considered sentencing outside the guidelines range.

Because Mr. Jiles has failed to demonstrate that the district court's sentencing error affected his substantial rights, we need not consider the fourth plain error factor.

AFFIRMED.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs. CASE NO. CR-02-29-C

E. W. "DUB" JILES,

Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
THURSDAY, SEPTEMBER 25, 2003
BEFORE THE HONORABLE ROBIN J. CAUTHRON,
CHIEF JUDGE PRESIDING

SENTENCING HEARING – VOLUME III OF III

APPEARANCES:

MS. KERRY KELLY and MR. ROSS N. LILLARD, III, Assistant U.S. Attorneys, Oklahoma City, Oklahoma, appeared on behalf of the plaintiff.

MR. CARL HUGHES, MR. SAM GUIBERSON, MR. KYLE GOODWIN and MR. JEB JOSEPH, Attorneys at Law, Oklahoma City, Oklahoma, appeared on behalf of the defendant.

* * *

[408] do under those circumstances would be to stand on our brief as to the cases too. But I just wanted to point out those few issues that I think are of some significance and I hope I did.

Thank you.

THE COURT: In dealing only with the vulnerable victim enhancement, and that amounts to two separate questions, whether there was a vulnerable victim, and, secondly, whether there was a large number of vulnerable victims, it seems absurd or it did to me when I first saw the objection to this enhancement, it seems absurd to think that the population of nursing homes is not vulnerable. Having read the cases that you have each cited in your briefs on this issue, and listening to the evidence, it is certainly not as clear cut as I had first thought but, nonetheless, I believe that the enhancement must apply in this case.

We've heard testimony of specific harm to specific people who were vulnerable at the time the harm was done. The harm was done as part of the criminal conduct in this case, and I don't think there's any dispute that relevant conduct comes into the picture in applying this enhancement. It is not just the money laundering to which Mr. Jiles has pled guilty but also the entire criminal scheme about which we have heard so much.

And in that scheme, closings occurred. They occurred through no fault of Mr. Jiles. They would have occurred [409] whether he was bribing Mr. VanMeter or not. But when they occurred, the way they were handled was far different than they would have been handled had this bribery not been going on. Protocol was not followed. People were transferred at great distances away from the closed facility. Families were affected. Raymond Powell, the most obvious of these victims, I guess is lost to society forever, if not a long time, as a result of having been taken in a way that was not appropriate under the Department of Health's protocols.

I would note at this point that I find Mr. Pickert to be an entirely incredible witness and I don't give any credence to his testimony as to what occurred at the Stevenson's nursing home.

Other victims were identified as a result of transfers from closed facilities. Those are Chuck Cherry, Mr. McGaugh, and Mr. – I think you're saying Nephew but I'm not sure I have that name right. They suffered harm as a result of being transferred without notification to their relatives by being transferred to a facility far distant from where they began. Those are specifically identifiable victims, but there are certainly many other victims of the criminal conduct.

The people who were in Rosewood, which was not cleaned up as a result of the collusion between Mr. VanMeter and Mr. Jiles, that some months later was found to be the worst situation that the examiner had ever seen. Had Mr. VanMeter [410] and Mr. Jiles not been engaged in this criminal conduct, that Facility would have been cleaned up after its first survey.

The most compelling evidence of the vulnerability of the victims is the words that we heard from Mr. Jiles himself from the wiretap, and that – those are the people who were, in his words, to be warehoused or placed in holding pens or traded or hidden or swapped, all for the advantage of Mr. Jiles. Maybe some of those trades and swaps didn't happen but many of them did, and people were placed in situations that were completely inappropriate. They were – they were, as he said, warehoused in some situations.

It is hard not to look at the entire population of nursing homes in the State of Oklahoma as potential

victims of Mr. Jiles and Mr. VanMeter's conduct had it been allowed to continue.

Admittedly, the case law regarding the number of vulnerable victims is not extensive. There is no help in the commentary to the guidelines themselves regarding what is a large number, but I find that this is a large number and I overrule your objection.

The remaining objection is to the leadership role. Ms. Kelly, do you want to argue that specifically or rely on your brief?

MS. KELLY: We will rely on our brief, Your Honor.

THE COURT: Mr. Hughes?

[411] MR. HUGHES: The same, Your Honor.

THE COURT: Under the guidelines, a guideline sentence can be enhanced – must be enhanced if the defendant's role in the offense mandates it. Under Section 3B1.1, if the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, the offense level is increased by four. That is what the probation officer has recommended in this case and what a good bit of this evidence concerned.

Clearly, there were five – at least five people involved in the criminal scheme. They were Mr. Jiles himself, Mr. VanMeter, Judy Cochran and Karen Verner, who also received bribes from Mr. Jiles, Kitt Wakeley, who committed an offense that would have amounted to mail fraud by returning the insurance form indicating that he was the sole and only owner of MMGI. It seems to me from the evidence that Phyllis Murray and Merilyn Stelly and Ed

Lee could also be considered criminal participants, although apparently they have not been charged and I don't mean to conclude that they are but it certainly appears that they had knowledge of the illegal conduct that was going on at the time that it was happening.

But even limiting it to the five I originally named, the defendant's argument is that Mr. Jiles wasn't the leader because Mr. VanMeter was in charge of these Department of Health employees and that Mr. Jiles had to work through [412] Mr. VanMeter and, therefore, Mr. VanMeter is the leader and Mr. Jiles is in some sort of subleadership position. That is clearly belied again by Mr. Jiles' own words on the tapes that we heard here in court. He was directing Judy Cochran and Karen Verner in telling them exactly what to do and when and where and how. He directed Mr. VanMeter in the money laundering activities, to which he has pled guilty. He told aim exactly what to do, took him with him and did it with him. And clearly Kitt Wakeley, as an employee, was under his control and it was to Mr. Jiles that he reported and took directions. He was the leader and organizer. He obtained more benefit than anyone else. We've seen the extent of the income to Oak Hills and MMGI and Mr. Jiles and it's clear that the only income to Mr. VanMeter was the 18,800 that was the bribe money.

Under the factors that are listed in the commentary to Section 3B1.1, and under the evidence as it has been adduced here in this courtroom, it is clear to me that Mr. Jiles is a leader and organizer of a criminal activity involving five or more participants. It's not necessary in order to make this finding but I also find that the criminal activity was otherwise extensive from the list of people who were involved, the geographic area, the length of

time, the amount of money. This was certainly an extensive criminal activity, and for either reason the increase is justified. I therefore overrule your objection to this as well.

[413] In making those findings, I have, in effect, ruled on many of the other objections that you have to the presentence report. But to any other extent, I find that your other objections are not so much as to the facts reported by the probation officer but they are offering a different construction on those facts or offering a different set of facts to consider along with those in the report. I have read them carefully and I have considered them as balancing what's in the presentence report, but none of them will make any difference in my sentencing decision. And to the extent I haven't already made findings, I will not do so.

The remaining question then is the defendant's motion for downward departure. Well, let me ask you, Mr. Hughes. Are there any other objections in the addendum to the presentence report upon which you want a specific ruling?

MR. HUGHES: I don't believe so, in view of your comments just now.

THE COURT: All right. Then we reach the downward departure motion. Again, I have a memorandum from the defendant and one from the government. I noted as we started that I had received letters from certain people that the defendant was offering as part of this hearing. I have also received a number of other letters. I don't know the number. But Ms. Kelly, I'm assuming the government has received a copy of those as well?

[414] MS. KELLY: No, Your Honor. Judge, we did receive this. I thought you meant something different. I apologize.

THE COURT: Good. I thought you had.

Do either of you wish to make additional argument regarding a departure other than what's in your briefs? Mr. Hughes?

MR. HUGHES: Your Honor, I believe it's stated in our brief. We'll stand on that.

MS. KELLY: The government will rely on its brief, Your Honor.

THE COURT: Mr. Jiles argues several factors warrant a downward departure in this case. Unfortunately, I can't find where those arguments are made. What was the title of the brief that has those arguments, Mr. Hughes?

MR. HUGHES: We're looking, Judge.

THE COURT: Here it is. I found it. It's in your sentencing memorandum.

MR. GUIBERSON: There's also a memorandum on behalf of Dub Jiles regarding sentencing options and downward departure.

THE COURT: Yes, I have that one too. I just wanted to list your arguments. You put forth extraordinary family circumstances, the disparity of sentence between the co-defendant, Mr. Jiles' age, aberrant behavior, community service and other good works, and a combination of all of those [415] factors.

Clearly, as to family circumstances, it is almost always the family who suffers most when a criminal defendant is convicted and placed in jail. In this case, I certainly don't mean to diminish or downplay in any way the important role you've taken in the lives of your granddaughters and the good that you've done but there's no – there's nothing apparent to me or asserted in these briefs that makes that extraordinary.

In order to depart on any of the grounds that you have urged, I have to find that the circumstances are different and so much different that it takes your case out of the heartland of cases that the guidelines are intended to govern.

Your family circumstances, while compelling, are simply not so different from those of any criminal defendant being sentenced that they take it out of the heartland.

The disparity of sentence between you and your co-defendant is not an appropriate ground for departure, and there are good reasons for that disparity, in any event.

There is nothing shown about your age that transfers that to a health question or in any way makes it anything more than simply unpleasant in prison, and I assume that that would be true regardless of your age. There is nothing about that that takes this out of the heartland.

And I find this is not aberrant behavior. It went on too long, it was too extensive. And while none of your friends and [416] family may know about any similar conduct that occurred previously, you have been described in some of these letters as a hard businessman or in terms that lead me to believe that in your business life, at least, this may

not be aberrant at all. In any event, it doesn't qualify under my view of aberrant behavior.

And, finally, community service and other prior good works is simply not appropriate in this case. Your good works are to be admired and encouraged but they are not circumstances that take this out of the heartland of cases.

I decline to depart in this case for all of those reasons and I am ready to impose sentence unless counsel have any other rulings I need to make.

MS. KELLY: Nothing from the government.

THE COURT: Mr. Hughes, –

MR. HUGHES: Nothing from the defendant.

THE COURT: – I'll permit you and Mr. Jiles to make any statement you care to make before I impose sentence.

MR. HUGHES: Your Honor, I think we've made our statements. I have nothing further to add for the Court.

THE COURT: Mr. Jiles, do you wish to be heard?

THE DEFENDANT: No, Your Honor.

THE COURT: Would you stand, please.

MR. HUGHES: Judge, do you want us to come up here?

THE COURT: Not if you're not going to speak.

[417] After all of my rulings, the offense level remains 26, with a criminal history category of I, and that results

in a guideline imprisonment range of 63 to 78 months. While I believe that the factors that you urged in support of a downward departure are not sufficient for a departure, I do believe that those circumstances merit a sentence at the bottom of the guideline range. Even a sentence at the bottom is certainly a significant sentence in this case, and particularly to someone who has no prior criminal history, and I think given the goals of sentencing, as set out in the statute, that the bottom of the range is sufficient in this case.

It is therefore my judgment that you be sentenced to the custody of the Bureau of Prisons to be imprisoned for a term of 63 months. On release from imprisonment, you will be placed on supervised release for a term of two years. Within 72 hours of your release from the custody of the Bureau of Prisons, you must report in person to the probation office of the district to which you are released. While on supervised release, you will comply with all standard conditions which have been adopted by this court. You will not possess a firearm or any other destructive device, and you will comply with the following special conditions. You are ordered to complete 104 hours of community service within the first year of supervision as directed by your probation officer. I suspend the requirement for mandatory urine screening as dictated by [418] Section 3608, but I specifically retain the probation officer's authority to administer such test for cause as permitted by that statute and by the standard conditions of supervision.

Mr. Jiles, I advise you – I'm sorry, there is more.

According to the preliminary order of forfeiture, you will forfeit the sum of $4,046.50, and you will pay to the

United States a special assessment of $100, which is due and payable immediately.

I advise you that under your plea agreement you have waived your right of appeal except in certain very limited circumstances. To the extent that a right of appeal survives that waiver, you are advised that your appeal must be to the United States Court of Appeals for the Tenth Circuit. That if you can't afford the costs of an appeal, you may apply for leave to appeal informa pauperis, that is, without prepayment of costs and for preparation of transcript at government expense. If you wish to file an appeal, you must do so within 10 days of today's date or you may request that the clerk spread that of record at this time.

I am not imposing a fine in this case. I believe that in Mr. Jiles' circumstances a fine is not serious punishment but that the prison sentence that is imposed is and the prison sentence will be enough.

You have made a request for designation at I believe the Fort Worth medical facility?

[419] MR. HUGHES: That's correct, Your Honor.

THE COURT: I will include in my judgment that I recommend that facility if Mr. Jiles is eligible. I caution you, Mr. Jiles, that that's nothing more than a recommendation on my part. The Bureau of Prisons will be guided by their own needs, and certainly in the case of that recommendation by your health needs, but I will include it in my order.

I have a written recommendation from pretrial services that Mr. Jiles be permitted to self surrender. Is there any objection to that, Ms. Kelly?

MS. KELLY: Your Honor, the government does not object to that; however, we would request simply 30 days which is the standard. He's already had six months to prepare his affairs.

THE COURT: Yes. I'm not going to give you more than 30 days within which to self-surrender but I will permit you to report to the designated institution no later than Monday, 12 noon, on October 27th, 2003. Until that time, you remain on the same conditions of release which have previously applied to your conduct, and a violation of a single one of those conditions could result in your detention pending designation of institution.

If there is a financial condition which has been imposed, it will be exonerated at the time you report.

Is there anything else? Ms. Kelly?

[420] MS. KELLY: Nothing from the government.

THE COURT: Mr. Hughes?

MR. HUGHES: Your Honor, I just wanted to note for the record that the forfeiture money has been paid to the U.S. Marshal's Service and we showed the prosecutors a copy of that receipt. That has been done. The $100 special assessment will be taken care of before we leave court.

MS. KELLY: We have received that, Your Honor; however, I believe the judgment and conviction needs to note that.

THE COURT: Yes, it does need to be in the judgment, both of those payments.

MR. HUGHES: Judge, our scribe is not sure he wrote down the right date for reporting. Was it October 27th?.

THE COURT: 27th. The 25th, which is 30 days, is a Saturday, so it is the 27th.

We'll be adjourned.

(PROCEEDINGS CLOSED)

REPORTER'S CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

11-14-03 /s/ Greg Bloxom
Date Greg Bloxom